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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capability	)	

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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September 25, 1998

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SUMMARY

CompTel submits the following recommendations in response to the issues raised in the *NPRM.*

ILEC Advanced Services Affiliates (*NPRM* ¶¶85-117): Although CompTel shares the Commission's frustration with ILEC obstacles to fulfillment of Section 251(c) of the Act, CompTel is deeply troubled by the proposal to authorize ILEC affiliates to deploy advanced services free of the Act's ILEC obligations. Although the *NPRM* explicitly discusses only "advanced services" affiliates, the technological basis and legal premise of its approach threatens a much broader application, to any type of affiliate – local, data, wireless, long distance – that the ILEC might wish to use to avoid the Act's obligations. Further, the separate affiliate approach rests on the faulty theory that an ILEC affiliate's interests and network needs will mirror those of a typical CLEC, a theory which cedes control over the direction and pace of competition to the ILEC. Finally, the approach will magnify inefficiencies in collocation practices, as an ILEC affiliate competes with unaffiliated CLECs for collocation space that is rapidly becoming exhausted.

The legal foundation of the separate affiliate approach, like its policy foundation, also is very shaky. Under Section 251(h)(1), an affiliate that receives benefits from its ILEC parent, whether by transfer of resources or other benefits resulting from its affiliation, qualifies as a "successor or assign" of the ILEC. Alternatively, under Section 251(h)(2), such affiliates would qualify as "comparable carriers" subject to ILEC regulation. In either case, the affiliate cannot be freed of ILEC obligations under Section 251(c).

If, nevertheless, the Commission attempts to define a "truly separate" affiliate, its separation rules must include the following additional requirements:

Compliance Plan. Prior to offering advanced services through an affiliate, an ILEC should submit a detailed plan demonstrating how the proposed affiliate satisfies each of the separation requirements adopted in this proceeding. Prior FCC review is necessary to ensure that individual affiliates are not subject to Section 251(c).

Substantial Independent Ownership. The Commission should require that an ILEC affiliate have a substantial percentage of its ownership held by persons other than the ILEC parent. CompTel recommends that at least 40 % of an affiliate's ownership be in independent hands. Independent ownership is critical to creating an entity that operates independently of the ILEC.

The Affiliate Should be Required to Use UNEs. The ILEC affiliate should be required to obtain access to the ILEC network on a UNE basis, and should be prohibited from reselling the ILECs' end user services. Use of UNEs is the only way that a separate affiliate structure can improve the availability of network elements to competitors.

Joint Marketing Should be Prohibited. The Commission should prohibit the ILEC and its affiliate from engaging in joint marketing or advertising of any kind. Joint marketing or advertising undermines the separation between the affiliate and the ILEC.

In addition, the seven separation requirements proposed in the *NPRM* should be strengthened in the following manner:

Joint Ownership. The ILEC and its affiliate should be prohibited from jointly owning any facilities or equipment, not just switching equipment, and from jointly owning any real property, not just the land or buildings in which switches are located. In addition, non-telecommunications functions and services should be made available on a nondiscriminatory basis.

CPNI. Access to the ILEC's CPNI should be provided on a nondiscriminatory basis.

Transfers of Assets. Any transfer of assets to an affiliate should subject the affiliate to ILEC regulation. Thus, the ILEC should be prohibited from transferring any assets, including customer accounts, equipment, employees, or brand names. Any use by an affiliate of a brand name similar to the ILECs' should be deemed a transfer of the name.

Reforms to the Commission's Collocation Rules (*NPRM*, ¶¶ 118-150): Traditional collocation arrangements – which presume that each CLEC's space must be physically separated by collocation "cages" – are unnecessarily cumbersome, costly and slow to provision. CompTel recommends the following reforms to collocation:

Cageless Collocation. Two forms of cageless collocation should be made available: First, ILECs should be required to offer "shared space collocation," in which the equipment of multiple CLECs is collocated side by side in an area dedicated to CLEC collocation. Second, ILECs should be required to offer "common space collocation," in which CLEC equipment is collocated in the same controlled environment as the ILEC's equipment, with only the minimum separation necessary to clearly identify each provider's equipment.

Collocated Equipment. The Commission should eliminate all restrictions on the type of equipment that may be collocated.

Collocation Delays. The Commission can reduce delays in the provisioning of collocation arrangements by requiring ILECs to conduct a "pre request" review of potential collocation spaces, by requiring ILECs to certify third parties that may perform collocation activities, and by establishing standardized intervals for collocation and pre-determined penalties for failure to meet those intervals.

Space Exhaustion. CompTel supports granting CLECs a right to conduct a "walk through" of spaces in which the ILEC claims space is unavailable. The ILEC should be required to remove equipment that is retired in place and to reassign non-essential functions outside the central office before a state commission can conclude that space is not available.

Additional UNEs Useful for Advanced Services (*NPRM*, ¶ 180). The Commission should define two additional UNEs to provide CLECs with the functionality necessary to provide advanced services. First, the Commission should define a "shared data transport" network element that would provide data transport between a CLEC's data network any other point on the ILEC's data network interfacing with a packet device. Second, the Commission should define a "shared data channel" network element that would extend from the interface with the CLEC's data network to a customer location.

Limited InterLATA Relief (*NPRM*, ¶¶ 190-196): CompTel opposes modifying the Commission's current policies regarding modifications of LATA boundaries for the RBOCs. The Commission should continue to evaluate LATA modifications on a case-by-case basis.

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COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following comments on the issues raised in the Notice of Proposed Rulemaking portion of the Commission's *Memorandum Opinion and Order, and Notice of Proposed Rulemaking* issued on August 7, 1998.[1]

I. INTRODUCTION

The *NPRM* continues the Commission's effort to bring the 1996 Act's promise of local competition to fruition. Issuing several declaratory rulings, the Commission turned back yet another obstacle erected by incumbent local exchange companies ("ILECs") to prevent competitive carriers from developing viable alternatives to the ILECs' services. By clearly and decisively ruling that "advanced services"[2] are subject to the interconnection, unbundling and

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1 *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket Nos. 98-147 et al., FCC 98-188 (rel. August 7, 1998) (hereinafter *NPRM*).

2 The Commission defined "advanced services" to include "wireline, broadband telecommunications services, such as services that rely on digital subscriber line

(continued...)

resale provisions of Section 251(c) of the Act,[3] the Commission moved closer to the goal of a robustly competitive telecommunications environment. The Commission made clear that Section 251(c) applies equally to voice and data telecommunications services, and in fact, is technology neutral.[4] Accordingly, an ILEC must offer interconnection for equipment and facilities used to provide advanced services.[5] It must offer unbundled loops and other UNEs with the necessary conditioning to provide high speed digital signals.[6] In addition, because the equipment and facilities used to provide advanced services are "network elements," an ILEC must offer these functionalities on an unbundled basis pursuant to Section 251(c)(3).[7] Finally, the Commission confirmed that ILECs must resell advanced services they offer to end users, even if these services are "access services."[8] CompTel supports and applauds these rulings.

The *NPRM* goes on to seek comment on additional proposals to achieve its goal of increasing opportunities for the provision of advanced services. Specifically, the Commission seeks comment on two categories of actions it might take to improve such opportunities. First, the *NPRM* proposes what is described as an "optional alternative pathway" pursuant to which an ILEC may create a "truly separate" affiliate, which would not be subject to Section 251(c)'s obligations and could provide advanced services on a largely deregulated basis. Second, the

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technology (commonly referred to as xDSL) and packet switched technology." *NPRM*, ¶ 3.

3 *Id.*, ¶ 32.

4 *Id.*, ¶¶ 11, 41.

5 *Id.*, ¶ 46.

6 *Id.*, ¶¶ 52-53. This obligation includes the obligation to provide loops provisioned over loop concentration devices, such as integrated digital loop carriers (IDLC) and digital subscriber line access multiplexers (DSLAMs). *Id.*, ¶ 54.

7 *Id.*, ¶¶ 57-58.

NPRM proposes additional national rules to strengthen and expand collocation rights and access to UNEs for advanced services.

The two proposals are in some degree of tension with each other. If the Commission proceeds with its proposal to relieve ILECs of Section 251(c)'s obligations, it may largely moot the progress made in its declaratory rulings and reduce the opportunities of competitive carriers to offer services in competition with the ILEC. Moreover, the proposal appears rooted in an implicit view of Section 251(c) as a hinderance to full competition, rather than the pro-competitive provision Congress envisioned. By contrast, its collocation and unbundled network element proposals demonstrate not only that Section 251(c) has not been fully implemented, but that there is much more progress to be made in opening local telecommunications markets to competition.

In these comments, CompTel strongly recommends that the Commission proceed with the blueprint set out in the Act. It can and should adopt national collocation and UNE rules reflecting the best of state initiatives thus far. Collocation can move beyond the costly and inefficient caged environment to a flexible approach eliminating unwarranted equipment restrictions and offering variety of caged and cageless options. Moreover, the Commission should adopt functional definitions of network elements, and define new network elements, to maximize new entrants' abilities to create innovative services utilizing the existing network infrastructure.

Meanwhile, the Commission should be careful not to impede competition or undermine Section 251(c) with a separate affiliate approach. The existence of a separate affiliate, even one

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[8] *Id.*, ¶ 61.

subject to the minimal separation requirements outlined in the *NPRM,* does not override the ILECs' statutory obligations. The advanced services affiliate approach would defeat the Commission's goal of breaking down the ILECs' local monopoly power, and, in effect, authorize ILECs to leverage that power into "advantages" bestowed upon its newly-created affiliate. Instead of creating a way for the ILEC to hold on to its monopoly status, the Commission should concentrate on making the collocation and unbundling obligations of the Act more effective.

II. THE 1996 ACT APPROPRIATELY BALANCES ILEC INCENTIVES AND OBLIGATIONS REGARDING ADVANCED SERVICES

Although CompTel shares the Commission's frustration with ILEC obstacles to fulfillment of Section 251(c), CompTel is deeply troubled by the Commission's proposal to create an "optional alternative pathway" for ILECs to avoid the Act's requirements. There is ample evidence that ILECs are aggressively deploying advanced technologies today and a noticeable lack of evidence that the proposal will speed the existing deployment pace. Rather than attempting to devise a better mousetrap, the Commission should enforce the Act as written. Only after Section 251(c) has been implemented should the Commission experiment with alternative regulatory approaches.

Most importantly, the FCC must understand the dangers of the approach it is suggesting. Although the *NPRM* explicitly discusses only an "advanced services" affiliate, the Commission cannot so neatly keep the genie in that bottle. Any rules adopted for "data affiliates" will create a template for ILECs to provide almost any retail service – local, data, wireless, long distance – through one or more separated affiliates completely outside of Section 251(c). Both the evolving nature of network transmission technology and the legal premise of its approach will break down any limitations the Commission attempts to maintain on its proposal.

It is no simple matter to separate, or "wall off," advanced services from traditional voice services. There are a plethora of "advanced" service alternatives planned or available in the market today. Although the technology differs with each, they share a common transmission theory. Each relies on the digital transmission of information, routed over a packet-switched network architecture. In comparison to older, "circuit-switched" networks, these new services rely on multiplexing to separate "packets" of information from a single communication, route the packets over the most efficient available paths, and assemble the packets in the correct order at the terminating end. This network architecture, when fully deployed, will be equally capable of supporting both high-bandwidth data applications and traditional voice calls. Because packets from the same communication will travel over a number of different paths simultaneously, it is impossible to limit users to data traffic or to effectively police the transmission of voice calls over such networks. Accordingly, "leakage" of voice traffic to the advanced service network will be uncontrollable.

There is no principled legal basis on which to confine the largely deregulated affiliate to advanced services. The *NPRM* proposes that an affiliate meeting certain conditions is not subject to Section 251(c), because it does not fit the statutory definition of an incumbent LEC. The analysis focuses on the structure of the affiliate and its relationships with the incumbent, not on the specific services the affiliate offers to end users. It is reasonable to assume, therefore, that the ILECs will aggressively use any rules adopted here to avoid, through corporate structure, the market-opening obligations of the Act, regardless of end user service it provides. The Commission already has evidence of such attempts before it now: In CompTel's petition in Docket No. 98-39, CompTel describes the attempts of BellSouth and other ILECs to create

"competitive local exchange carriers" to offer services within their own ILEC regions. Such activities will only increase if the Commission adopts its proposals in this proceeding.

Further, the NPRM largely fails to address the putative benefits of the separate affiliate approach. One theory is that this approach could strengthen the ILECs' provision of UNEs under Section 251(c)(3) because the ILECs' would have to provide UNEs in compliance with the statute for the affiliate to successfully provide retail services, and then other CLECs could obtain UNEs on a nondiscriminatory basis. While CompTel does not dismiss these benefits entirely, it believes they can easily be overstated.[9] That theory rests upon the premise that the separate affiliate's use of UNEs will be representative of all other CLECs. However, there is no evidence to support that premise. To the extent the separate affiliate does not utilize certain UNEs, or uses UNEs in different quantities and configurations than other CLECs, the mere existence of the separate affiliate is insufficient to ensure that the ILEC offers UNEs in full compliance with Section 251(c)(3). As one example, the ILECs' affiliates may provide services through physical collocation arrangements while subsequent entrants are precluded from such arrangements because all available collocation space is taken. Those entrants will have to use different network configurations, and the ILECs will have every incentive to discourage those arrangements by failing to provide UNEs as required by the statute. As another example, to the extent the ILECs' separate affiliates have UNE requirements in greater quantities than other CLECs, the ILECs will have an incentive to try to discriminate in favor of their affiliates through volume discounts and similar mechanisms.

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[9] As noted in Section IV *infra*, this theory falls apart if the affiliate provides retail services through total service resale under Section 251(c)(4). For that reason and others, CompTel submits that the Commission, should it proceed further with the separate affiliate approach, must require the ILEC affiliate to provide retail services using UNEs.

Certainly, the separate affiliate approach would enable the ILECs to control the direction and pace of technological and service innovation in this critical market segment. If an unaffiliated CLEC develops a new service offering, or a new configuration for providing an existing service, the ILEC will have no incentive to supply UNEs to that CLEC in compliance with the statute until such time as its own affiliate is ready to provide a similar offering. In addition, CompTel is concerned that the separate affiliate approach will entail such significant monitoring, implementation and enforcement efforts that the Commission will have relatively few remaining resources to enforce its current rules and otherwise require the ILECs to comply with Section 251(c)(3)-(4). Now is the time to spend more resources on enforcing the Act, not fewer, and the establishment of a separate affiliate approach implicitly channels resources away from other necessary enforcement measures.

The Commission also should take into account the enormous strain that the separate affiliate approach will place upon scarce central office resources. There is no need from a technical, market or consumer perspective for the ILECs to provide advanced services through a separate affiliate. However, if the Commission makes such an approach attractive to the ILECs as a means of escaping Section 251(c) requirements, the ILECs can be expected to use such affiliates aggressively to provide advanced and other local services. The result will magnify the inefficiencies of current collocation arrangements, and contribute to the premature exhaustion of precious central office space as the ILEC's separate affiliates begin provisioning large numbers of customers through collocation arrangements.[10] Although CompTel believes collocation can be made more efficient, the replacement of an ILECs' facilities (which must be shared pursuant

[10] CompTel's proposal limiting the amount of collocation space that an ILEC affiliate may occupy (*see* Section V(D) infra) mitigates somewhat but does not eliminate this concern.

to Section 251(c)) with an affiliate's facilities will tax limited resources and hinder unaffiliated CLECs' abilities to expand their networks and customer bases efficiently.[11] Indeed, the cumbersome and dilatory system by which the ILECs' currently process collocation requests could be strained to the breaking point under the weight of massive collocation requests by ILEC separate affiliates. Therefore, CompTel submits that the Commission should take into account the evident drawbacks, as well as the alleged benefits, of the separate affiliate approach.

These dangers underscore the importance of adhering to Section 251's approach. The Act is premised on the idea that competition will provide the best incentives for ILECs and new entrants to offer new and innovative technologies and services. Section 251(c) reflects the practical reality that the prospects for competition depend upon the availability of the ILECs' ubiquitous network to competitors. No carrier can hope to replicate the ILECs' networks, and instead must rely on it to round out their telecommunications service offerings. Indeed, the incumbents must adhere to their obligation to provide access to facilities and services that are critical to competitive participation in the market for wireline services.

Congress anticipated that there might one day be a better method of promoting full competition among providers. It provided for that possibility by authorizing the FCC to forbear from applying Section 251(c), upon making the appropriate findings under Section 10 of the Act. Critically, however, the Act expressly *prohibits* the FCC from forbearing until after Section 251(c) has been implemented. The clear message of Congress' prohibition is simple: Do not attempt to devise a "better approach" until after the market-opening initiatives of Section 251

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[11] An ILEC affiliate will not be subject to many of the economic disincentives toward using collocation space inefficiently, and therefore, ILEC separate affiliates will soak up available collocation space like a sponge. This will, inevitably, restrict the ability of unaffiliated CLECs to use collocation space when it makes economic sense for them to

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have been implemented. Although the FCC seeks to side-step this provision by claiming that it is not proposing forbearance, this is a distinction without a difference. If an ILEC deploys facilities through its affiliate it has removed those facilities from Section 251 to the same extent as if it had placed them in the ILEC and the FCC exercised its forbearance authority. Thus, the Commission cannot forbear from applying Section 251(c), whether it does so directly or, as proposed, indirectly.

Of course, nothing in the Act prohibits the FCC from establishing incentives for the ILECs to comply with the Act. It may, if it chooses, regulate with a carrot rather than a stick. For example, the FCC could specify certain actions it might take upon full implementation of Section 251(c), such as relaxed regulation of xDSL services, or greater alternatives to sharing xDSL-based network elements. In other words, it could use the promise of relaxed regulation or greater flexibility – to be effective *after* an ILEC implements the Act – as an incentive to speed the pace of the ILECs' compliance. If the Commission's goal is to create better incentives for compliance, CompTel submits that this approach is a better alternative than the one suggested in the *NPRM*.

III. SECTION 251 DOES NOT FREE ILEC AFFILIATES FROM THE OBLIGATION TO COMPLY WITH SECTION 251(C)

A. The FCC Should Accord The Statutory Term "Successor or Assign" Its Most Common, Natural Meaning Under Section 251(h)(1)(ii)

The ILEC requirements in Section 251 apply to any affiliate qualifying as an ILEC's "successor or assign" under Section 251(h)(1)(ii). The Commission notes that to be an advanced

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(...continued)
do so.

services affiliate, such affiliate "must not be a successor or assign" of the ILEC.[12] The NPRM tentatively concludes that an affiliate is not a "successor or assign" if it is "truly separate" from the ILEC, which the FCC interprets to mean that an affiliate must not derive any "unfair advantage" from its ILEC parent.[13] Without conceding that a "truly separate" affiliate need not comply with the ILEC obligations under Section 251, CompTel submits that the FCC has interpreted the "successor and assign" provision too narrowly. An affiliate who obtains *any* advantage from its ILEC parent – including any transfer of assets, personnel or goodwill -- qualifies as a "successor or assign" under Section 251(h)(1)(ii). Under the statute, there is no such thing as a "fair advantage" that a local service affiliate can obtain from its ILEC parent. The overriding goal of Section 251 is to break down the ILECs' local market power, and it would defeat that goal for the ILECs to leverage that market power into "advantages" that they can bestow upon local service affiliates they have created for the express purpose of avoiding Section 251 requirements.

CompTel previously addressed the proper regulatory classification of ILEC local service affiliates in a petition that it and two other industry associations submitted to the FCC earlier this year.[14] The *CompTel Petition* demonstrated that an ILEC local service affiliate who receives a

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12 NPRM, ¶ 104.

13 NPRM, ¶ 87.

14 *See* "Petition for Declaratory Ruling or, In the Alternative, for Rulemaking," submitted by CompTel, Florida Competitive Carriers Association and Southeastern Competitive Carriers Association, CC Docket No. 98-39, filed March 23, 1998 ("*CompTel Petition*") (Appended as Attachment A hereto). The *NPRM* encompassed the issues raised by CompTel, but stated inexplicably that "[w]e do not address CompTel's petition in this proceeding." (*NPRM*, ¶ 91 n.178) CompTel submits that it would violate principles of due process and reasoned agency decision-making for the FCC to decide issues raised in the *CompTel Petition* without addressing the petition itself. As a result, CompTel incorporates its petition and the record developed in response to that petition into the

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transfer of resources or other benefits from their ILEC parents qualifies as a "successor or assign" under Section 251(h)(1)(ii). When an ILEC creates an affiliate with the same ownership and management, the affiliate is a "successor" of the ILEC under the most common meaning of the term.[15] Similarly, the most natural definition of the legal term "assign" is that it refers broadly to an entity receiving a "transfer" of something of value, and therefore encompasses an affiliate with a dowry in the form of a transfer of assets, personnel or goodwill.[16] Particularly when these terms appear together in the context of Section 251(h)(1)(ii), the Commission should broadly hold that any affiliate providing intraLATA services of any kind qualifies as a "successor or assign" of the ILEC.[17]

A broad, natural interpretation of the statutory terms "successor or assign" fully comports with Congress' purpose in adopting Section 251. The ILEC requirements in Section 251(c) are critical to the development of local competition. Congress did not intend for the ILECs to be able to evade Section 251(c) through the simple expedient of creating new corporate entities to provide some or all local services. The opening of the local market should not be lost in a corporate shell game. If ILECs are given this alternative, the result would be that Section 251(c) would apply to an increasingly diminished and antiquated local exchange network that cannot feasibly be used by new entrants to provide competitive local services. In its Memorandum

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current proceeding.

15 *CompTel Petition* at 9-10.

16 *E.g.*, Black's Law Dictionary 118 (6th ed. 1990) ("assign" means "to transfer, make over, or set over to another"); Webster's II New Riverside Dictionary (1984) ("assign" means "to transfer (property, rights, or interests)").

17 Of course, the necessity for such a holding becomes even more critical when that affiliate receives a transfer of assets, personnel or goodwill from an ILEC. Even without a transfer, however, the affiliate is a successor or assign.

Opinion and Order in this proceeding, the FCC correctly applied Section 251(c) to encompass advanced communications networks, functions, capabilities and services for the benefit of local competition and local consumers. The Commission would defeat the market-opening goals of the 1996 Act were it to adopt a narrow interpretation of the terms "successor or assign" that permitted the ILECs to use separate affiliates to end-run the Section 251(c) requirements.

The "successor or assign" provision is not the only way Congress attempted to preclude clever ILEC end runs around Section 251. In addition, the Act recognizes that "comparable carriers" may be subject to Section 251's obligations. Using this provision, the Commission should declare that an affiliate who provides intraLATA services (with or without a transfer of assets, personnel or goodwill from an ILEC) is a "comparable" carrier to the ILEC under Section 251(h)(2).[18] That section authorizes the Commission to regulate a carrier as an ILEC if

> "(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);
>
> (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and
>
> (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section."

An ILEC affiliate who enters the local service market with any advantages derived from its ILEC parent qualifies as a comparable carrier under these standards. Particularly when the affiliate uses its parent's brand name, logo and other resources, the affiliate will be perceived (and is intended to be perceived) by customers as the ILEC's alter ego. As such, it plainly occupies a comparable market position to the ILEC under subsection (A). Further, with respect

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18 *CompTel Petition* at 13-15.

to its own services and customer base, the affiliate plainly has substantially replaced the ILEC under subsection (B). Lastly, for the reasons specified above and in the *CompTel Petition*, regulating such an affiliate as an ILEC promotes the public interest, convenience and necessity as well as the pro-competition goals of the 1996 Act within the meaning of subsection (C). Therefore, the Commission should hold that an ILEC affiliate providing intraLATA services is a comparable carrier, and therefore an ILEC, under Section 251(h)(2).

B. An Affiliate Qualifying As A "Successor or Assign" Is Fully Subject To The ILEC Requirements In Section 251

Lastly, CompTel takes issue with the FCC's apparent view that an ILEC affiliate who obtains ownership of network elements is a "successor or assign" of the ILEC parent only with respect to those network elements.[19] That approach is flatly inconsistent with the plain language and meaning of Section 251(h). Any entity that qualifies as a "successor or assign" of an ILEC is *fully* subject to the ILEC requirements in Section 251. In particular, Section 251(h) states that "a person or entity that . . . [becomes] a successor or assign" of an ILEC qualifies as an ILEC "[f]or purposes of this section." There is no dispute that the term "this section" refers to Section 251, including the ILEC requirements in Section 251(c), and that the terms "person or entity" refer to the affiliate in its entirety. As written by Congress, Section 251(h) leaves no room for the Commission to impose Section 251 obligations upon a portion of an ILEC affiliate's assets or operations.

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19 *See 47 C.F.R. § 53.207; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22055-56, (1996) (*"Non-Accounting Safeguards Order"), subsequent history omitted.*

Moreover, the FCC's apparent approach – limiting the application of Section 251(c) to specific transferred assets – is simply unworkable. It would be an administrative nightmare to segregate those assets which are subject to Section 251(c) from those which are not, and otherwise to track and monitor the use of those assets by the affiliate. Further, as the affiliate expands and upgrades its network over time, the specific assets initially transferred from the parent will be transformed and ultimately lose their original separate identity within the affiliate's business operations. The only administratively feasible approach is to interpret and apply Section 251(h)(1)(ii), as written by Congress, so that an affiliate is fully subject to Section 251(c) whenever it qualifies as a "successor or assign."

The plain-meaning interpretation of Section 251(h) comports fully with common sense. When an ILEC transfers specific network elements or other assets to its affiliate, the benefit derived by the affiliate is not limited to those particular assets, but rather extends to the affiliate's entire business operations. When the ILEC uses those assets to provide services to end-user subscribers, it uses them in conjunction with its other assets, not in a segregated manner. Because the affiliate commingles all assets (including those transferred from its ILEC parent) to provide services, it would promote Congress' and the Commission's pro-competition goals to subject the affiliate's entire operations to the market opening requirements of Section 251(c).

IV. EVEN IF A SEPARATE AFFILIATE APPROACH WERE PERMISSIBLE, MORE RIGOROUS STANDARDS WOULD BE NECESSARY TO ACHIEVE THE NPRM'S OBJECTIVES

As discussed above, both the legal and the policy basis for authorizing a separate advanced services affiliate to operate outside of Section 251(c) is weak. If the Commission decides to pursue such a path, however, it must establish rigorous separation requirements if the affiliate is to be subjected to CLEC-like obligations. It is not enough that the FCC focus solely

on whether an affiliate is a "successor or assign" of the ILEC, as the *NPRM* appears to do. Instead, separation requirements must be stringent enough so that the affiliate is neither a successor or assign nor a comparable carrier.[20] Any of these entities are subject to Section 251(c)'s interconnection, unbundling and resale obligations. Accordingly, if the FCC is to outline the path proposed in the *NPRM*, it must define an affiliate sufficiently independent of the ILEC that it does not receive any advantages from its affiliation.

If a separate affiliate approach is to have any validity at all, the Commission must take to heart two principles articulated in the *NPRM*. First, the ILEC affiliate must be "truly separate" from the ILEC.[21] Only a "truly separate" entity can arguably avoid the obligations created by Section 251(c). Second, not only must an affiliate be "truly separate," but it also "must function just like any other competitive LEC . . .."[22] Unless the FCC aggressively follows these two principles, its efforts will have disastrous results.

The separation requirements proposed in the *NPRM* fall far short of these principles. These requirements present a superficial appearance of separation, without altering the fundamental commonality of the ILECs' combined enterprise. The proposed affiliate – while separate in a corporate sense –would simply be an *alter ego* of the ILEC, used to stand in the ILEC's place when its regulatory framework provides maximum advantage to the ILEC. Indeed, it accomplishes a most pernicious form of separation. It allows the ILEC to pick and choose how to deploy equipment and facilities in its network based upon the regulatory scheme that gives it the most advantage. Through its decision to deploy equipment or facilities through its affiliate,

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20 *See* 47 U.S.C. §§ 251(h)(1)(A), 251(h)(1)(B), and 251(h)(2).

21 *NPRM*, ¶ 86.

22 *Id.*, ¶ 87.

the ILEC can avoid Section 251(c)'s obligations for equipment and network elements most critical to the deployment of advanced services. At the same time, though, the affiliate is able to combine traditional and advanced telecommunications services into a single integrated package at the retail level. Consumers, therefore, would be presented with essentially the same offering they would receive if the ILEC offered advanced services on an integrated basis, with the only difference being that competitors are restricted in their ability to offer an alternative service.

If the Commission is serious about establishing a "truly separate" affiliate, it must adopt rules that remove *all* advantages of incumbency, and avoid rules which create only the appearance of independence. Only when an affiliate is structured with the same advantages and disadvantages of an unaffiliated entity, and in no way benefits from its association with the incumbent, can separation have any meaning.

A. The Commission Cannot Conclude that Particular ILEC Affiliates are not Subject to Section 251(c) without First Reviewing and Approving a Compliance Plan

Before addressing the standards that must be established, CompTel notes that the *NPRM* contains a fundamental procedural flaw. Although it proposes standards for ILEC advanced services affiliates, the *NPRM* offers no procedure for determining whether any given ILEC affiliate satisfies the standards. Given both the far-reaching consequences flowing from the FCC's proposed structure and the significant likelihood of disputes over a particular entity's classification, it is critical that the FCC, as part of any proposal to relieve ILEC affiliates of Section 251(c) obligations, require an ILEC to submit a compliance plan with the Commission describing how its affiliate satisfies each of the separation requirements adopted, so that the Commission may make individualized determinations that an affiliate is not subject to Section 251(c).

The circumstances under which an ILEC's advanced services affiliate could be found not to be subject to Section 251(c) are detailed and fact-driven. The *NPRM* already proposes seven standards that such an affiliate must satisfy, and, as shown below, many more rigorous requirements are necessary to achieve the Commission's stated objectives. While it is appropriate to use a rulemaking such as this to establish the standards by which an affiliate will be judged, the determination that a particular affiliate meets these standards cannot be made in this proceeding. Instead, a separate procedure must be established which will give the FCC a record, based on individualized facts, to conclude that a specific entity is, in fact, not subject to Section 251(c)'s obligations. It is substantially more efficient to make this determination at the outset, rather than allowing an ILEC to deny interconnection and access and force CLECs to use costly and time-consuming litigation to resolve the ILECs' claims.[23]

Thus, it is imperative that the Commission require an ILEC to prepare and file a compliance plan prior to offering advanced services through an affiliate. Under this procedure, an ILEC should submit to the Commission a compliance plan demonstrating, in detail, how the affiliate complies with the separation requirements adopted in this proceeding. This compliance plan should be verified by affidavits from officers of both the ILEC and the proposed affiliate, and should include all supporting evidence demonstrating that the affiliate complies with the FCC's standards. The FCC should receive public comment on each compliance plan, and make a determination, based upon a full record, whether the affiliate may be relieved of Section 251(c)'s obligations.

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[23] Moreover, if an ILEC denies interconnection in the context of a negotiation process, the CLEC likely will not have sufficient information available to it to evaluate the validity of the ILECs' claim. The procedure CompTel recommends, by contrast, would require the ILEC to produce to the Commission all of the information necessary to determine

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The Commission has used an advanced review procedure such as this on many occasions. For example, in the *Computer III* proceeding, the FCC required the filing and approval of comparably efficient interconnection ("CEI") plans in order to monitor the BOCs' compliance with various requirements relating to the provision of specific enhanced services.[24] Specifically, the *Computer III* rules require a BOC seeking to provide enhanced services on an integrated basis to obtain approval of a CEI plan, after a public comment period, demonstrating how the affiliate will provide service and how comparable interconnection will be provided to unaffiliated enhanced services providers.[25]

Similarly, when the FCC was constructing its "video dialtone" rules, the Commission relied upon prior approval, through Section 214, to ensure that its proposed rules were being complied with. In the video dialtone orders, the Commission repeatedly stressed the importance of the Section 214 certification process as a means to ensure that its policies served the public interest.[26] Section 214 approval was critical because "many important issues will arise only in connection with specific video dialtone proposals."[27] Noting that video dialtone technologies

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whether the affiliate qualifies under any standard adopted in this proceeding.

24 A BOC's CEI plan describes how it plans to comply with nine equal access parameters in the provision of specific enhanced services: (1) interface functionality; (2) basic service unbundling; (3) resale; (4) technical characteristics; (5) installation, maintenance and repair; (6) access to the end user; (7) CEI availability when the BOC offers enhanced services to the public; (8) minimization of transport costs; and (9) availability to ISPs. *See Amendment of Section 64.702 of the Commission's Rules and Regulations,* Report and Order, CC Docket No. 85-22, Phase I, 104 FCC 2d 958, 1039-1042 (1986) (Phase I Order), *subsequent history omitted* ("*Computer III*").

25 *Id.*.

26 *See, e.g., Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58,* CC Docket No. 87-266, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992).

27 *Id.* at 5840.

were new and evolving, the Commission emphasized that prior approval was necessary because "even those applications that use previously approved architectures may pose other issues that warrant careful consideration in the context of a specific proposal."[28] It noted that, at that time, the new and evolving nature of video dialtone technology increased the significance of a prior Commission approval requirement. Indeed, the Commission concluded that "[p]articularly during the early stages of video dialtone implementation, even those applications that use previously approved architectures may pose other issues that warrant careful consideration in the context of a specific proposal."[29]

The same types of concerns are present in the instant proceeding. Compliance can be determined only in response to a fact-specific set of circumstances. Moreover, because advanced service technologies and network architectures are evolving rapidly, a prior approval process is necessary to address new issues that may warrant careful consideration by the Commission. By establishing such a procedure now, the Commission can address these issues most effectively and most rapidly.

B. Additional Separation Requirements are Necessary to Ensure that an ILEC Affiliate is "Truly Separate."

The *NPRM* proposes the following separation requirements:

> First, the ILEC must "operate independently" from its affiliate;
>
> Second, transactions between the ILEC and its affiliate must be on an arm's length basis, reduced to writing, and made available for public inspection;

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28 *Second Report and Order, aff'd, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking,* CC Docket No. 87-266, 10 FCC Rcd 244, 312 (1992).

29 *Id.*